Nos. 79-5195/6, 5198 and 5245

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

O R D E R

V.

FILED

OCT 22 1981

JOHN P. HEHMAN, Clerk

ATHENS CARL McLAUGHLIN (79-5195)
GREGORY THOMAS METOYER (79-5196)
SAMUEL PATRICK TOUCHARD III (79-5198)
ERIC M. TOUCHARD (79-5245),

Defendants-Appellants

/

Before: WEICK and ENGEL, Circuit Judges and PECK, Senior Circuit Judge

All four defendants were convicted of count one of a nine-count indictment charging them with conspiracy to distribute heroin and cocaine between early 1973 and July, 1977, contrary to 21 U.S.C. §§ 843, 846. Defendant McLaughlin was convicted of counts 4, 6 and 7, charging him with possession with intent to distribute and distribution of heroin during certain periods of time within the period of conspiracy. Metoyer was also convicted of count 6. Defendants raise a number of issues in common and certain defendants, particularly McLaughlin, challenge the adequacy of the evidence supporting their conviction of the substantive charges.

Upon a careful review of the record as a whole, the court is of the opinion that the government properly charged and proved a single criminal conspiracy involving the sale and distribution of heroin between California and Tennessee and that the involvement of each defendant in that conspiracy was sufficient to support his conviction on that count. The court also finds sufficient evidence to support the conviction of McLaughlin on the substantive

Appendix A

charges of counts 4, 6 and 7, and to support Metoyer's conviction on count 6.

The court is further of the opinion that there was no fatal variance between the proofs and the allegations in the indictments.

The defendants charge several instances of prosecutorial misconduct. Their primary misconduct claim is based on Brady v. Maryland, 373 U.S. 83 (1963). In particular, they claim that the government prosecutor deliberately withheld information known to him but not to the defendants that a key government witness, one McKinley, had in previous criminal trials denied the sale of drugs or having ever been to California for the purpose of buying drugs. This previous testimony was flatly contradicted by McKinley's testimony in this case. The information came to light later in the trial and United States District Judge L. Clure Morton, after carefully considering the matter, denied the several motions for mistrial and for dismissal of the indictments for misconduct. While it is true that Judge Morton initially offered to grant a new trial upon the condition that all defendants consent thereto, it is apparent from the record that his ultimate decision to continue on in the present trial was based upon his conclusion that the Brady violation was curable. He permitted ample cross-examination, offered any necessary adjournment of the trial for counsel to investigate, and gave strong curative instructions to the jury, all of which we conclude were adequate to cure the taint of the government misconduct. See United States v. Enright, 579 F.2d 980, 989-90 (6th Cir. 1978).

The court has carefully examined the other allegations of prosecutorial misconduct and concludes that while the conduct of the prosecution at times left much to be desired, at no time did it rise to the level of reversible error or deny to any defendant the

essentials of a fair trial. Moreover, Judge Morton's curative instructions substantially weakened the overall effect of the prosecutor's indiscretions.

In the course of the execution of a search warrant of the apartment allegedly occupied by Eric Touchard, the government seized a paper containing 32 names, each with a number beside it. This seizure, the defendants assert, was outside the scope of the warrant. Defendants also dispute the government's claim that the exhibit was in "plain view", thus making the seizure lawful under that exception to the warrant requirement. The court is of the opinion that the document does come within the plain view exception to the warrant requirement. See Coolidge v. New Hampshire, 403 U.S. 443, 446 (1970)(plurality); United States v. Truitt, 521 F.2d 1174 (6th Cir. 1975). Plaintiffs' reliance upon United States v. Gray, 484 F.2d 352 (6th Cir. 1973), is misplaced because the search warrant in question here, which called for the search and seizure of evidence indicating ownership and possession of the apartment, justified the closer inspection which led the officers to reasonably conclude that they had discovered an incriminating document. The defendants' claim that this exhibit was not sufficiently authenticated is also without merit.

The defendants claim that the aforementioned errors singly and particularly in combination produced a trial such as that which had been the concern of the United States Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946); Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring), and that each defendant was denied the right to have his own involvement

and evidence thereof separately considered. The court is of the opinion that the trial, while long, was not basically unfair and that Judge Morton's governance of it avoided the errors of those cases. In addition, the court finds no reversible error in Judge Morton's instructions to the jury.

Each of the four defendants, McLaughlin, Metoyer, Eric and Samuel Touchard, received a special parole term of three years as part of his sentence for the conspiracy conviction. Each sentence was imposed prior to the United States Supreme Court's decision in Bifulco v. United States, 447 U.S. 381 (1980). As the government concedes, Bifulco requires that the special parole term aspect of each defendant's conspiracy sentence be vacated. Accordingly,

IT IS ORDERED that each defendant's sentence is vacated and the cause remanded to the district court for resentencing in accordance with this order. The judgment of the district court in each appeal is affirmed in all other respects.

ENTERED BY ORDER OF THE COURT

John D Hilleman

Clerk

Nos. 79-5198 and 79-5245

FILED

DEC 1 1981

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

O R D E R

V.

SAMUEL P. TOUCHARD, III (79-5198)
ERIC M. TOUCHARD (79-5245)

Defendants-Appellants

Before: WEICK and ENGEL, Circuit Judges and PECK, Senior Circuit Judge

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appellants has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman

Clerk

Appendix B

81-6198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

SAMUEL PATRICK TOUCHARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO
PROCEED
IN FORMA PAUPERIS

Pursuant to 18 U.S.C. §3006A(d)(6) and Rule 53 of this Court, the Petitioner, Samuel Patrick Touchard, asks leave to file the attached Petitioner for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of fees or costs and to proceed in forma pauperis. The Petitioner was represented by counsel appointed pursuant to 18 U.S.C. §3006A in the district court and on appeal to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MICHAEL NOEL
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421 Charlotte Avenue
Nashville, Tennessee 37219
(615) 256-5003

Attorney for Petitioner

81-6198

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IN THE
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v.

UNITED STATES OF AMERICA,

Respondent.

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MOTION TO CONSOLIDATE ALL PETITIONS
FOR CERTIORARI
IN THESE MATTERS

Comes now the attorney for the petitioner Samuel Patrick Touchard and would show to the Court that it is his understanding that at least three other co-defendants, Athens Carl McLaughlin (79-5195) and Gregory Thomas Metoyer (79-5196) and Eric Touchard (79-5245), are also going to file petitions for certiorari as concerns the decision of the United States Court of Appeals for the Sixth Circuit filed on October 22, 1981. All of these parties were co-defendants at the trial held in the Middle District of Tennessee in 1979.

These cases were all consolidated for oral arguments and briefing before the United States Court of Appeals for the Sixth Circuit. They have in all respects always been consolidated. The issues that would be raised in the various petitions for certiorari are common to each of the defendants who participated at the trial below and who seek review of the decision of the Sixth Circuit Court. Since these cases are sought to be reviewed

on certiorari to the same Court and involve identical or closely related questions, it is requested that this petitioner be allowed to participate in any hearings that are granted to other petitioners, and further, that these individual petitions for certiorari be consolidated pursuant to the spirit of Rule 19 of the United States Supreme Court Rules.

Respectfully submitted,

MICHAEL NOEL
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(615) 256-5003

Attorney for Petitioner

CERTIFICATE

I certify that I have provided a copy of this motion to the following counsel:

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   Attorney for Appellant Gregory Thomas Metoyer

4. Mr. Lionel R. Barrett, Jr.
   Attorney at Law
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   Nashville, Tennessee 37201
   Attorney for Appellant Eric Touchard

on this the 8th day of February, 1982.

MICHAEL NOEL